WISHA REGIONAL DIRECTIVE
Department of Labor and Industries
Division of Occupational Safety and Health

2.35 GOOD FAITH RELIANCE ON L&I ADVICE BY EMPLOYERS

Date Issued: July 14, 2006

I. Background

There are many ways in which employers and employees obtain guidance from the Department of Labor and Industries (L&I) regarding workplace health and safety rules adopted under the Washington Industrial Safety and Health Act (WISHA). Department publications are available on a variety of topics, as are workshops, Internet materials, and fact sheets. In addition, employers and others sometimes request answers to specific questions from regional enforcement and consultation staff, as well as from policy staff and others in central office. Finally, employers and employees receive compliance guidance from regional staff during worksite inspections and consultations.

On occasion, employers who have been cited indicate that they relied upon previous guidance received from one or more of these sources. Historically, L&I has treated documented WISHA violations as general violations *if* the employer could demonstrate that he or she relied upon guidance provided by a DOSH consultant during a worksite consultation. Although the policy did not explicitly address guidance from other sources within L&I, a similar analysis has often been applied to those situations.

Legally, L&I has the authority to cite employers for violations of WISHA even if the employer relied upon erroneous L&I information about the applicable requirements. However, L&I has chosen to exercise its enforcement discretion to adopt the alternative approach outlined in this directive.

II. Scope and Application

This WISHA Regional Directive (WRD) applies to all apparent WISHA violations where the employer indicates that he or she was relying upon guidance provided by the department. It replaces WRD 2.35, issued March 20, 2002 and will remain in effect indefinitely.

III. Special Enforcement Protocols

A. How should an inspector handle a situation where the employer claims that an apparent violation identified by the inspector was the result of previous L&I guidance?

When an employer claims that he or she either failed to recognize a violation or failed to adequately address a violation because of specific, previous guidance provided by an L&I representative, the inspector is expected to evaluate that claim in accordance with the following guidance.

1. If the employer can provide written substantiation of the claim (or other convincing evidence), the inspector must address the issue as described in "B" below before issuing a citation:
2. If the employer cannot readily substantiate the claim (if, for example, the employer relied upon an oral answer to a question in an employer workshop or during a previous onsite visit by a consultant or an inspector), the inspector is expected to make a reasonable effort to determine the truth of the employer's assertion by contacting the L&I staff involved to confirm or clarify the issue.
3. In some cases, the employer may have misunderstood the guidance provided. In such cases, any violations identified must be issued (with appropriate consideration given to "good faith" in calculating any penalty).
4. When an employer raises such an issue, the employer's assertion may be based on the fact that a L&I inspector or consultant was present in the worksite and did not identify the violation. In such cases (whether because circumstances have changed, because the hazard was outside the scope of the previous activity, or even because the inspector or consultant simply missed the violation), any violations must be cited.

B. If the inspector determines that the employer is correct in his or her assertion, how should the inspector resolve the apparent dispute?

It is important that any further communication with the employer reflect a considered DOSH position, rather than appearing to be simply a disagreement between two L&I staff. Therefore, if the involved L&I staff cannot readily agree, the inspector is expected to consult with his or her supervisor. Unless the supervisor can resolve the issue by reference to the plain language of the standard in question, or by the plain language of an existing policy directive, the supervisor is expected to seek guidance from the Compliance Manager. If there is *any* doubt about the issue or it can not be resolved at that level, the Compliance Operations Manager must be contacted to ensure that the answer given to the employer during the inspection represents the agency's considered position.

C. *How should such issues be handled when citations are issued?*

If the inspector and supervisor (after any necessary consultation with the Compliance Manager or Compliance Operations Manager) conclude that the employer was in fact relying upon incorrect guidance from a L&I representative, the conditions in question will not be cited. However, the citation and notice must include a message indicating that

the conditions were not cited because the employer was relying upon previous L&I guidance *and* directing the employer to comply with the standard in the future.

For example, such a message might read: "The employer was not cited for the unguarded point of operation on Machine A because the inspection determined that the employer was relying upon guidance given by a previous DOSH inspector. WAC 296-806-20028 requires that the point of operation of Machine A be guarded. The employer is hereby directed to comply with this requirement in the future, and any failure to do so will result in citation and possible monetary penalties in the event of a future inspection."

D. If the employer fails to comply in the future, can the violations be cited as failure-to-abate?

No. Since the issues will not have been cited as violations, they cannot be used as a basis for failure-to-abate or repeat violations. However, the employer's refusal to comply after being clearly directed to do so can be appropriately considered in relation to evaluating "good faith" and potentially willful behavior.

E. Can follow-up inspections be conducted to determine if problems that were not cited (as a result of this policy) have been corrected?

Yes. The inspector and supervisor also can ask for verification that problems have been corrected. Although such issues are not covered by the formal verification of abatement requirements, such inquiries are appropriate in order to determine whether follow up activity is necessary.

F. Does this policy create a basis for appeal beyond L&I?

No. Agency staff are expected to follow this policy, as interpreted by the department. However, the department's decision to exercise such enforcement discretion does not create a right enforceable by anyone outside L&I. Similarly, this WRD does not create a new defense to an otherwise valid citation. It may be presumed that, if the department chooses to send a citation to the Board of Industrial Insurance Appeals in spite of an employer's claims to have relied on previous advice, the department has rejected the employer's claim of agency inconsistency.

Approved: _____

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